No. 12,429

In The United States Court of Appeals
For the Ninth Circuit

HUDSON LUMBER COMPANY (a corporation) and ELKINS SAWMILL, INCORPORATED, *Appellants*,

vs.

UNITED STATES PLYWOOD CORPORATION and SHASTA PLYWOOD, INC., *Appellees*.

APPEAL FROM THE UNITED STATES DISTRICT COURT,
NORTHERN DISTRICT OF CALIFORNIA,
SOUTHERN DIVISION

BRIEF OF APPELLEES

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THE ARGUS PRESS, SEATTLE

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INDEX

TABLE OF CASES

STATUTES

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JURISDICTION

Appellees concur that the District Court had jurisdiction and that this Court has jurisdiction to review the order in question.

STATEMENT OF THE CASE

The appellee, United States Plywood Corporation, entered into a contract to sell logs to the appellant, Hudson Lumber Company (R. 19-36 incl.). Paragraph Three of the contract (R. 21-25) sets out a formula for determining the cost of the logs sold under the contract. As set forth in Paragraph XI of appellants' complaint (R. 14) a controversy has arisen between the parties "as to the meaning and effect and applica-

tion" of these provisions. Some time subsequent to July 21, 1949, and prior to August 4, 1949, Mr. Heilpern, counsel for United States Plywood Corporation, wrote a letter to counsel for the appellants, replying obviously to a letter which had questioned a statement as to the costs of the logs delivered. In this letter Mr. Heilpern stated that in his opinion the statements of the auditor had been prepared in conformity with the contract and insisted on payment of the amounts based on their statements. His letter closes with this language:

> "If the parties to the agreement are unable to settle amicably their differences, such dispute can, of course, be arbitrated as provided in paragraph '10' of the contract. However, pending such arbitration, it is expected that your client will pay all invoices at the time and in the manner specified in the contract." (R. 47, 48)

Shortly thereafter the appellants instituted an action in the Superior Court of the State of California for the County of Alameda, setting up the fact that such controversy had arisen, asking for declaratory judgment as to "the true meaning, effect and application" of the contract provision relating to cost, and "that defendants and each of them be enjoined from: (1) commencing other actions or proceedings pending determination of this action, to enforce or recover their claimed rights under the matter in controversy; (2) proceeding or attempting to proceed to arbitration or to compel plaintiffs to submit thereto; (3) cancelling or attempting to cancel or declare forfeit the rights and interests of the plaintiffs under said contract by reason of any claimed default resting in

defendants' contentions as to the matter in controversy above set forth" (R. 18).

The appellees removed the case to the United States District Court, Northern Division, moved for dismissal of the action and in the alternative for a stay, under the provisions of 9 U.S.C.A. §3, and the court granted the stay.

QUESTIONS INVOLVED

In our view of this case it is so simple that it is difficult to formulate a statement of the questions involved which will present the issue which the appellants apparently are attempting to assert. Two questions are presented:

1. When a contract provides that in case of any disagreement or difference as to the construction thereof such disagreement shall be submitted to arbitration, and a disagreement has arisen as to the construction of such contract and one party thereafter brings an action for declaratory judgment and requesting among other relief that the other party be enjoined from proceeding with arbitration, is the other party entitled to a stay of action in accordance with the provisions of 9 U.S.C.A., §3?

2. When such arbitration clause contains this statement, "but nothing herein shall be deemed to preclude either party from securing injunctive relief to prevent irreparable injury by reason of a claimed breach of this agreement," does a request by one party for arbitration constitute irreparable injury within the meaning of this clause?

ARGUMENT

I. Summary of Argument

When the parties have entered into a contract which contains a provision for arbitration of all controversies arising thereunder and a dispute arises between them as to the interpretation of a clause specifying the method of determining the cost of the subject matter of the contract and one party brings an action for declaratory judgment and to enjoin the other from commencing any other action to enforce their claimed rights under the contract and from proceeding or attempting to proceed to arbitration and from compelling or attempting to compel the rights of the plaintiff under the contract, the defendants (appellees here) are entitled to a stay of further proceedings pending further arbitration under the express provisions of 9 U.S.C.A., §3.

Where the arbitration clause contains this language:

> "* * * but nothing herein shall be deemed to preclude either party from securing injunctive relief to prevent irreparable injury by reason of a claimed breach of this agreement,"

and the matter in controversy is the method of determining the cost of the product to be sold under the contract, a request by one party (appellees) for arbitration of the controversy or an indication that they will attempt to secure arbitration of the controversy, all in accordance with the express terms of the arbitration agreement, cannot constitute irreparable damage within the language of the arbitration clause above quoted.

II. The Arbitration Clause in the Contract, Separate from the Exception Clause Would Clearly Entitle Appellees to a Stay of the Action Brought by Appellants.

The arbitration clause in question is as follows:

> "10. It is hereby agreed that in case any disagreement or difference shall arise at any time hereafter between either of the parties hereto in relation to this agreement, either as to the construction or operation thereof, or the respective rights and liabilities thereunder, such disagreement shall be submitted to arbitration in the State of California, pursuant to the Rules of the American Arbitration Association as then in effect, but nothing herein shall be deemed to preclude either party from seeking injunctive relief to prevent irreparable injury by reason of a claimed breach of this agreement." (R. 29)

It is obvious that if this clause ended with the words "pursuant to the rules of the American Arbitration Association as then in effect" there could be no question whatsoever as to the propriety of the order of the court staying this proceeding pending arbitration. 9 U.S.C.A., §3, reads as follows:

> "§3. Stay of proceedings where issue therein referable to arbitration.
>
> "If any suit or proceeding be brought in any of the courts of the United States upon any issue referable to arbitration under an agreement in writing for such arbitration, the court in which such suit is pending, upon being satisfied that the issue involved in such suit or proceeding is referable to arbitration under such an agreement, shall on application of one of the parties stay the trial of the action until such arbitration has been

had in accordance with the terms of the agreement, providing the applicant for the stay is not in default in proceeding with such arbitration. July 30, 1947, c. 392, §1, 61 Stat. 669."

This section is applicable to actions removed from a state court to a federal court. *Perry v. Bache*, 5 Cir., 125 F.2d 493. The application of the statute is not limited to contracts mentioned in 9 U.S.C.A. §2. *Donahue v. Susquehanna Collieries Co.*, 3 Cir., 138 F.2d 3.

Appellees are entitled to a stay of all proceedings pending arbitration. *Evans v. Hudson Coal Co.*, 3 Cir., 165 F.2d 970. *Shanferoke Co. v. Westchester Co.*, 293 U.S. 449, 55 S. Ct. 313, 79 L. ed. 583; *Kulukundis Shipping Co. v. Amtorg Trading Corporation*, 2 Cir., 126 F.2d 978.

With the exception of two arguments of the appellants which we will dispose of later, their entire brief is devoted to an effort to bring themselves within the closing language of the arbitration clause again quoted for easy reference and which reads as follows:

"10. It is hereby agreed that in case any disagreement or difference shall arise at any time hereafter between either of the parties hereto in relation to this agreement, either as to the construction or operation thereof, or the respective rights and liabilities thereunder, such disagreement shall be submitted to arbitration in the State of California, pursuant to the Rules of the American Arbitration Association as then in effect, but nothing herein shall be deemed to preclude either party from seeking injunctive relief to prevent irreparable injury by reason of a claimed breach of this agreement." (R. 29)

III. The Language in the Arbitration Clause Reserving the Right of Injunctive Relief Does Not Apply to a Controversy Between the Parties as to the Interpretation of a Clause of the Contract.

It is not necessary in this proceeding to determine the entire scope of the language in question. Its only importance is whether it takes this particular case out of a situation where otherwise the appellees (defendants below) would clearly be entitled to a stay. In considering this it must be borne in mind that all we have is a controversy as to the interpretation of a clause in a contract, a declaration by the attorney for the appellees that he feels his client's interpretation is correct, and an offer to arbitrate in accordance with the contract. From such a molehill, the appellants have constructed themselves a mountain compounded of "ifs" and "maybes," for it must be noted that these things that they say may happen are based upon speculations and fears. For instance, in the statement in the summary of points in appellant's brief at page 13, this statement is made (emphasis is supplied):

> "10. *If* appellees rescind or cancel the contract or declare forfeit appellants' rights thereunder (that is to say, *if* appellees refuse further deliveries of cedar logs under the contract) by reason of appellants' failure to pay the larger amounts claimed by appellees etc."

Again, at page 7 of their brief they say:

> "* * * appellants *fear* that appellees will purport to cancel or refuse performance, etc.",

and the same word "fear" appears at page 32 of their brief:

> "* * * and (2) where the plaintiff *fears* that

the defendant is about to take steps such as rescission or cancellation, etc."

It requires no extended citation of authority that an injunction will not be granted merely on the basis of fears and apprehensions. *City of Osceola, Iowa v. Utilities Holding Corporation*, 8 Cir., 55 F.2d 155:

> "The applicable rule is thus stated in 32 Corpus Juris at page 42: 'It is not sufficient ground for an injunction that an injurious act may possibly be committed, or that injury may possibly result from the act sought to be prevented; but there must be at least a reasonable probability that an injury will be done if no injunction is granted, and not a mere fear or apprehension. Injunctions will not be granted merely to allay the fears and apprehensions of individuals, which, it has been said, may exist without substantial reasons and be absolutely groundless. In these circumstances the mere fact that an injunction would not injure the defendant will not authorize its issuance." (p. 158)

The fact is that appellants having once agreed to arbitrate have now changed their minds. These parties made a contract which provided for arbitration of disputes concerning its construction. Such a dispute has arisen. The appellees are ready to arbitrate in accordance with the express provisions of the contract and the appellants do not wish to. They say, in their complaint:

> "Defendants threaten to attempt to compel such arbitration proceedings, notwithstanding the said provisions of said contract saving to the parties the right to seek injunctive relief. If

> plaintiffs are compelled to proceed to such arbitration they will be denied their day in court and the expressly reserved right to injunctive relief to prevent irreparable injury by reason of a claimed breach of the contract, *and will thereby be irreparably injured by being forced to accept the award of arbitrators rather than the decree of a court of equity after a hearing and determination according to law.*" (R. 17) (Emphasis supplied)

It is thus apparent that the appellants want this issue tried in a court of law instead of by arbitration and are trying to avoid the agreement which they made that such matters should be arbitrated. If they preferred to settle these disputes by litigation instead of by arbitration, the time to have raised that objection was before the contract was signed calling for arbitration, and not after the contract was executed with an arbitration clause and a dispute has arisen within the precise scope of the arbitration clause.

In Paragraph XV of appellants' complaint (R. 16, 17) this clause is apparently considered as giving the parties the alternative of seeking arbitration or injunctive relief.

It will be noticed that injunctive relief may be sought to prevent irreparable injury by reason of a claimed breach of the contract. Appellants do not claim that appellees have breached the agreement, nor do they say that either party claims that the other has breached the agreement.

Appellants say that a disagreement exists as to the *interpretation* of the contract and they go further and

say that the appellees threaten to compel arbitration on such disagreement.

We fail to see how the action of the appellees in seeking to arbitrate a disagreement of the type covered and intended to be covered by the arbitration agreement, can constitute a breach of that contract.

We have stated earlier that it is not necessary in this case to determine the exact scope of the closing clause of the arbitration agreement, but merely to see that it does not apply in this instance. The appellants have made reference in their brief to two affidavits (R. 44-48), one by the president of one of the appellants and one by counsel for appellee, United States Plywood Corporation (R. 49-51) which are in disagreement as to which party requested the language in the arbitration clause. While we refer to what Mr. Heilpern said in his affidavit, it is not necessary, as we have indicated above, to rest our argument on the example given as to the meaning of this clause which is as follows:

> "In justification for this modification of the arbitration clause, Mr. Neall pointed out that Hudson Lumber Company was going to build a large mill at Anderson to manufacture the slats from the cedar logs and that their operations would be wholly dependent upon continued deliveries of cedar logs from the timber controlled by United States Plywood Corporation. He stated that if United States Plywood Corporation were to divert the cedar logs from the plant of Hudson Lumber Company it would suffer irreparable injury and that arbitration proceedings would not afford an adequate remedy to prevent such in-

> jury. He therefore asked for the inclusion in the arbitration clause of a provision for the right to secure injunctive relief to prevent irreparable injury." (R. 51)

The intent of the injunctive relief provision in the arbitration clause clearly appears to be that if one of the parties seeks to rescind, or refuses further to perform the contract on account of a claimed breach, the other party is not barred, if it can bring itself within the equitable rules relating to injunctions, from seeking to prevent such rescission or non-performance, pending the determination of the controversy in arbitration proceedings. In this connection it will be noted that the first sentence is a firm commitment that any disagreement or difference "shall be submitted to arbitration in the State of California. * * *." It can hardly be seriously argued that plaintiffs make out a case of irreparable damage, within equity rules, through being compelled to arbitrate as they agreed to do, in case of "any disagreement or difference."

IV. The Contract Provision in Question Is Clearly for Arbitration and Not Appraisal.

There appears to be a thread of argument running through the brief of appellants beginning on page 26 and pointed up at page 28 to page 31 that the arbitration clause really was a clause for appraisal and not for arbitration.

In considering this argument of the appellants we wish to call the attention of the court to the language of the arbitration clause, being Paragraph 10 of the

contract (R. 29), which provides for arbitration in case of "any disagreement or difference * * * either as to the construction or operation thereof or the respective rights and liabilities thereunder." Despite this all inclusive language, appellants conclude (pp. 27, 28 of their brief) that the arbitration clause was intended to cover only pure matters of fact and not to include "any legal question or mixed question of law and fact." Such a conclusion, of course, is squarely contrary to the express language used in the instrument.

It is not our intention to burden the court with an extended discussion of the distinction between appraisal and arbitration which is, of course, well known. Appraisals relate to determination of quantities, values and the like.

The case of *Luedinghaus Lumber Co. v. Luedinghaus*, 9 Cir., 299 Fed. 111, cited by appellants (page 30 of their brief) involved a question as to the *quantity* of timber—a problem of measurement. Of course, the court held that this involved an appraisal, not an arbitration. The very quotation from the opinion (pp. 30-31, appellant's brief) points out the proper distinction. We quote in part:

> "'* * * Arbitration presupposes a dispute and is a recognized common-law method of settling disputes and controversies. If there is no matter in dispute there is no question for arbitration. * * * *There is a broad distinction between a submission to arbitration and a provision for incidental appraisement or measurement*'." (Italics supplied)

In the course of this same opinion the court quotes from the leading case of *Palmer v. Clark*, 106 Mass. 373:

> " 'A reference to a third person to fix by his judgment the price, quantity, or quality of material, to make an appraisment of property and the like, especially when such reference is one of the stipulations of a contract founded on other and good considerations, differs in many respects from an ordinary submission to arbitration. It is not revocable'." 299 Fed. 111, 113.

The California case cited by the appellants (p. 29 of their brief) *Rives-Strong Building, Inc. v. Bank of America, N.T. & S.A.*, 50 C.A.2d 810, 123 P.2d 942, involving as it did the determination of rental on the renewal of a lease, clearly involved appraisal and not arbitration.

> "There is a clearly recognized distinction between the arbitration of a controversy and a contract one term of which calls for the ascertainment by designated persons of values, quantities, losses or similar facts. Palmer v. Clark, 106 Mass. 373, 389." *Franks v. Franks*, 294 Mass. 262, 1 N.E.2d, 14, 16.

> "It is the general rule that provisions in contracts for price or value fixing are held to provide for appraisals and not arbitrations." *Hegeberg v. New England Fish Co.*, 7 Wn.2d 509, 519, 110 P.2d 182, 186.

The arbitration clause in this case covers "any disagreement or difference—in relation to this agreement, either as to the construction or operation thereof, or the respective rights and liabilities thereunder * * *." This obviously refers to an arbitration—not

an appraisal. And appellants own complaint shows that the issue in controversy is obviously one for arbitration and not appraisal.

"XI.

"An actual controversy has arisen and now exists, between the plaintiffs on one side and the defendants on the other, as to the meaning and effect and application of the above quoted provisions of said contract relating to the measuring and scaling of the logs and the method of computing and determining the cost of said cedar logs.

"Plaintiffs contend that the 'common cost' therein referred to, of all species derived from the La Tour timber should, under the true meaning of said provision, be computed on the net scale of all the logs of all species, after deduction and allowance for all visible defects as set forth in said cutting contract.

"Defendants contend that such 'common cost,' under the true meaning of said provision, should be computed on the gross scale of all logs of all species, before deduction and allowance for said defects." (R. 14)

However, even the type of present controversy is not controlling:

"* * * a clause of general arbitration does not cease to be within the statute when the dispute narrows down to damages alone (citing cases). If the clause is general in form, it make no difference what may come up under it." *Shanferoke Coal & Supply Corp. v. Westchester S. Corp.*, 70 F.2d 297, affirmed 293 U.S. 449, 55 S. Ct. 313, 79 L. ed. 583.

V. Appellees Have Not Waived Their Right to Arbitrate This Controversy.

At pages 36-40 of their brief appellants argue that the appellees have waived their right to request arbitration. It is quite true that the court may refuse to stay a proceeding pending arbitration on the application of a party who is in default. The question as to the meaning of the words "default in proceeding with such arbitration" contained in the statute has been discussed by the courts and will be referred to later. We wish to point out to the court the facts in the case of *La Nacional Platanera S. C. L. v. North American Fruit & Steamship Corporation*, 5 Cir. 84 F.2d 881, cited by appellants at page 36 or their brief.

> Plaintiff began an action in state court in 1931. The complaint was filed in March, 1932.
>
> April, 1932, the suit was removed to the Federal Court.
>
> June, 1932, demurrers were filed.
>
> September, 1932, plaintiff moved to remand the cause to the state court.
>
> It was argued May, 1935, and denied June 5, 1935.
>
> November, 1935, plaintiff for the first time asked that the dispute be submitted to arbitration.

The court says at page 883:

> "* * * We have no hesitancy in deciding that by bringing the action at law to recover damages, ignoring the provisions of the charter party for arbitration, and then delaying for nearly four

> years before attempting to invoke arbitration, plaintiff was so much in default that he was not entitled to demand arbitration."

It is obvious that this case is entirely inapplicable to the case at bar.

The cases of *Winsor v. German Savings & Loan Soc.*, 31 Wash. 365, 72 Pac. 66, and *Young v. Crescent Development Co.*, 240 N.Y. 244, 148 N.E. 510, cited at pages 37 and 38, appellants' brief, are simply not in point. The appellees have done nothing to disturb the *status quo* in this case. They are ready to arbitrate at any time, and their desire to so arbitrate obviously prompted this action brought by the appellants.

The question of waiver is considered at length in the case of *Kulukundis Shipping Co. v. Amtorg Trading Corp.*, 2 Cir., 126 F.2d 978. There is a very excellent discussion on page 989 from which we quote in part as follows:

> "There remains to be considered the language of Section 3 of the Act that 'on application,' such a stay shall be granted 'providing the applicant for the stay is not in default in proceeding with such arbitration.' We take that proviso to refer to a party who, when requested, has refused to go to arbitration or who has refused to proceed with the hearing before the arbitrators once it has commenced. The appellant was never asked by appellee to proceed with the arbitration; indeed, it is the appellee who has objected to it. In Shanferoke Coal & Supply Corp. v. Westchester S. Corp., 2 Cir., 1934, 70 F.2d 297, plaintiff alleged that defendant, after part performance, materially breached the contract. The defendant in its

answer denied the allegations and, as a special defense, set up an arbitration clause in the contract, alleged that it was willing to arbitrate, and moved for a stay under Section 3 of the Arbitration Act. Answering plaintiff's contention that defendant was 'in default in proceeding with such arbitration,' we held that the fact that defendant may have breached the contract was not a 'default' within that statutory provision; we said that the initiative as to proceeding with the arbitration rested upon plaintiff, adding: 'If it did not but sued instead, it was itself the party who fell "in default in proceeding with such arbitration," not the defendant.' Our decision was affirmed in Shanferoke Co. v. Westchester Co., 1935, 293 U.S. 449, 55 S. Ct. 313, 79 L. ed. 583.

"Accordingly, we conclude that the defendant here was not in default within the meaning of the proviso in Section 3. It follows that the district court should have stayed the suit pending arbitration to determine the damages."

See also *Almacenes Fernandez, S.A. v. Golodetz*, 2 Cir., 148 F.2d 625, and *Shanferoke Co. v. Westchester Co.*, 293 U.S. 449, 55 S. Ct. 313, 79 L. ed. 583,

CONCLUSION

The remainder of appellants' brief is devoted to the exposition of legal principles which may very well be correct statements of law but which are wholly irrelevant to the issues here on appeal. This case is clearly one for arbitration, which received congressional approval in enacting the Arbitration Act. See *Shanferoke Co. v. Westchester Co.*, 293 U.S. 449, 453, 55 S. Ct. 313, 79 L. ed. 583. We submit that the action of

the District Court in staying this proceeding pending arbitration was correct and should be sustained.

Respectfully submitted,

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